APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 89-0211-CV-W-5

MICHAEL P. VAUGHN, *et al.*,
Plaintiffs

vs.

RONALD E. SEXTON, *et al.*,
Defendants.

ORDER

(Filed July 2, 1991)

Before this Court is defendants' motion for summary judgment and plaintiffs' motion for partial summary judgment. For the following reasons, defendants' motion for summary judgment will be denied; plaintiff's [sic] motion for partial summary judgment will be granted.

The facts of this case have been provided numerous times is[sic] several previous orders by this Court. They will not be set forth again in this order.

Fed.R.Civ.P. 56(c) requires "the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53 (1986). The burden on the party moving for summary judgment "is only to demonstrate . . . that the record does not disclose a genuine dispute on a material fact." *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op.*, 838

F.2d 268, 273 (8th Cir. 1988). This burden is met once the moving party identifies portions of the record bearing out its assertions. *White v. McDonnell Douglas Corp.*, 904 F.2d 456, 458 (8th Cir. 1990).

Once the moving party has done so, a party opposing summary judgment may not rest merely upon the allegations in its pleadings. *Green v. St. Louis Housing Authority*, 911 F.2d 65, 68 (8th Cir. 1990). The burden shifts to the non-moving party to go beyond his pleadings and by affidavit or by "depositions, answers to interrogatories, and admissions on file" show that there is a genuine issue of fact to be resolved at trial. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553. Evidence of a disputed factual issue which is merely colorable or not significantly probative, however, will not prevent entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2511 (1986).

In ruling on a motion for summary judgment, this Court must view all facts in a light most favorable to the non-moving party, and that party must receive the benefit of all reasonable inferences drawn from the facts. *Robinson v. Monaghan*, 864 F.2d 622, 624 (8th Cir. 1989).

However, summary judgment is designed to remove factually unsubstantial cases from court dockets. *Smith v. Marcantonio*, 910 F.2d 500, 502-3 (8th Cir. 1990). This Court must, therefore, grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

Defendants move for summary judgment on the ground that plaintiffs' claim for ERISA withdrawal liability asserted against Williams Meat Company was denied by the bankruptcy court. Subsequent to defendants' motion, the bankruptcy court, on agreement of the parties, entered its order allowing plaintiffs' claim against Williams

Meat Company. Defendants' motion for summary judgment will therefore be denied.

Plaintiffs move for partial summary judgment against all defendants under Count II of plaintiffs' complaint. Plaintiffs' motion is "partial" only in that plaintiffs seek time within which to file additional proof of accrued interest, attorney's fees and costs.

There are three groups of defendants in this case: numerous corporations all owned or controlled by defendant Ronald Sexton, the Sexton Family Trust, and Ronald Sexton individually.

This Court has already found that the defendant corporations are part of a single ERISA defined control group. These defendants did not request arbitration within the allowed time period after receiving notice of withdrawal liability. The corporate defendants, therefore, waived any defense they may have asserted to withdrawal liability. Summary judgment will, therefore, be entered against the corporate defendants jointly and severally under Count II of plaintiffs' complaint.

Defendant Sexton Family Trust will be deemed part of the control group only if it is found that it is a trade or business under common control of an employer. 29 U.S.C. § 1301(b)(1).

In the instant case, the Sexton Family Trust leased Las Vegas and Prairie Village condominiums and real property in Nevada to various corporate defendants. These activities are sufficient to make the Sexton Family Trust a trade or business under ERISA definitions. *Western Conference of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892, 894-95 (9th Cir. 1988); *Central States Southeast and Southwest Areas Pension Fund v. Sztanyo Trust*, 693 F. Supp. 531, 537 (E.D. Mich. 1988); *Pension Benefit Guaranty Corp. v. Ouiment* [*sic*] *Corp.*, 470 F. Supp. 945, 948-49 (D. Mass. 1979). Summary judg-

ment will, therefore, be entered against the Sexton Family Trust under Count II.

Plaintiffs argue effectively that defendant Ronald Sexton is individually liable under a piercing of the corporate veil theory. Defendants argue with equal effect that the transactions set forth by plaintiffs as evidence in support of this theory are legitimate corporate dealings.

This Court finds that this issue need not be addressed. There is no question but that defendant Ronald Sexton controlled the defendant corporations and the Sexton Family Trust. As found above, the Sexton Family Trust is a trade or business for ERISA purposes and is thus a control group member. As the grantor, trustee and controlling entity of the Sexton Family Trust, defendant Ronald Sexton is deemed the employer of this unincorporated entity and is thus personally liable. 29 U.S.C. § 1301(b)(1); *see also Lafrenz*, 837 F.2d at 895 (individuals are personally liable for withdrawal liability as the sole proprietors of an unincorporated trade or business under their common control).

For the above reasons, it is hereby

ORDERED that defendants' motion for summary judgment is denied. It is further

ORDERED that plaintiffs' motion for partial summary judgment under Count II of plaintiffs' complaint is granted. It is further

ORDERED that judgment is entered in favor of plaintiffs and against all defendants jointly and severally in the amount of $249,652.00 for withdrawal liability, plus $174,905.03 for interest, double interest and attorney's fees incurred to January 19, 1990, plus interest, double interest and attorney's fees and costs incurred since January 19, 1990, as yet to be determined. It is further

ORDERED that plaintiffs shall submit on or before July 12, 1991, documentation of interest, double interest

accrued and attorney's fees and costs incurred from January 19, 1990, to the present. It is further

ORDERED that defendants shall submit any objections to the reasonableness of attorney's fees and costs on or before July 24, 1991.

/s/ Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

July 2, 1991